

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

OHIO STATE CONFERENCE OF THE)
NATIONAL ASSOCIATION FOR THE)
ADVANCEMENT OF COLORED PEOPLE,)
ET AL.,)

Plaintiffs,)

CASE NO. 2:14-cv-404

vs.)

JON HUSTED, ET AL.,)

Defendants.)

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING

BEFORE THE HONORABLE PETER C. ECONOMUS

MONDAY, AUGUST 11, 2014; 9:00 A.M.

COLUMBUS, OHIO

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FEDERAL OFFICIAL COURT REPORTER

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Plaintiffs' Argument by Mr. Young	Page	3
Defendants' Argument by Mr. Voigt	Page	26
Defendants' Argument by Mr. Armstrong	Page	42
Plaintiffs' Rebuttal by Mr. Young	Page	54
Defendants' Surrebuttal by Mr. Voigt.....	Page	61
Defendants' Surrebuttal by Mr. Armstrong.....	Page	61

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Monday Morning Session

August 11, 2014

9:00 a.m.

IN OPEN COURT:

COURTROOM DEPUTY CLERK: The Court calls the case of The Ohio State Conference of the National Association for the Advancement of Colored People, et al., vs. Jon Husted, et al., Case Number 2:14-CV-404.

THE COURT: Thank you, Denise.

Good morning.

MR. YOUNG: Good morning, Your Honor.

MR. VOIGT: Good morning, Your Honor.

THE COURT: Are counsel ready to proceed?

MR. YOUNG: Yes, Your Honor.

THE COURT: You may go forward.

This is plaintiffs' motion.

MR. YOUNG: May it please the Court, my name is Sean Young, from the ACLU Voting Rights Project. I'm here with my colleagues from the ACLU on behalf of the Ohio State Conference of the National Association for the Advancement of Colored People, the League of Women Voters of Ohio, and several African American churches and other civic organizations and volunteers who have invested countless hours fighting to expand access to the polls in Ohio.

Our clients have witnessed firsthand how, after the

1 Election Day meltdown of 2004, in response, Ohio created the
2 right to in-person early voting, including the opportunity to
3 register and vote on the same day. They have seen and helped
4 thousands of Ohioans exercise and take advantage of and come to
5 rely on these precious voting opportunities.

6 As Chief Justice Roberts recently said, there is no
7 right more precious, more basic in our democracy than the right
8 to participate in electing our political leaders. This year,
9 with SB 238 and a set of directives, the State has redefined
10 the in-person early voting period, resulting in significant
11 restriction of the rights of thousands of Ohio voters.

12 Now, there's one thing I want to make very clear, Your
13 Honor, because defendants have repeatedly said in their briefs,
14 and they're probably going to say it today, that this case is
15 about how many early voting days Ohio should have.

16 And let me be crystal clear. This case is not only
17 about the reduction in the raw number of early voting days. If
18 that's all that this case was about, it would be a completely
19 different case.

20 This case is about the elimination of specific voting
21 opportunities that place a special and unique burden on
22 primarily low-income and African American voters that come to
23 rely on these opportunities. This includes the elimination of
24 same-day registration, a ban on weekday evening voting in the
25 early voting period for the first time since Ohio first created

1 the early voting period, and a dramatic reduction of all Sunday
2 voting to four hours on a single afternoon.

3 Plaintiffs are here to challenge this redefinition of
4 the in-person early voting period. And, specifically, we're
5 asking this Court to enjoin SB 238 and order Secretary Husted
6 to set uniform and suitable hours on multiple Sundays and
7 weekday evenings.

8 First, I'll briefly describe why plaintiffs are likely
9 to succeed under the Fourteenth Amendment to the U.S.
10 Constitution. Then we'll discuss why plaintiffs are likely to
11 succeed under Section 2 of the Voting Rights Act. And, lastly,
12 we'll explain why each of the remaining preliminary injunctions
13 warrant granting plaintiffs the relief that we seek.

14 Under the Fourteenth Amendment, as Your Honor is more
15 than well aware, the State cannot roll back the right to vote
16 for thousands of voters without an adequate justification. And
17 the greater the burdens that are imposed by the State, the
18 stronger their justification has to be.

19 Here, the State's redefinition of the in-person early
20 voting period imposes significant burdens that they do not even
21 come close to adequately justifying.

22 With respect to the burdens -- and Your Honor has read
23 all the briefs -- tens of thousands of Ohioans have exercised
24 the right to vote in reliance on the specific opportunities
25 being eliminated.

1 Now, defendants and their experts just kind of assume,
2 without any evidence, that, you know, everyone can just switch
3 to a different day whenever they want. But one thing I want to
4 make clear, Your Honor: This case is not about the
5 hypothetical middle- or upper-class voter, which probably
6 describes everyone in this room. This case is about low-income
7 voters whose day-to-day reality is vastly different.

8 And it's very difficult for many of us to easily
9 comprehend, but we've tried to illustrate those burdens in the
10 many declarations that are unrefuted in this case. Your Honor
11 easily recognized this in OFA when you noted the
12 disproportionate impact that eliminating the final weakened
13 would have on low-income voters.

14 These declarations show that low-income voters cannot
15 easily adjust to Ohio's redefinition of the in-person early
16 voting system. First, with respect to the elimination of
17 same-day registration, before SB 238, low-income voters,
18 usually with the help of third-party organizations and
19 individuals like our plaintiffs, could simply go to the Board
20 of Election office and resolve all registration issues and vote
21 all in one shot.

22 The Northeast Coalition for the Homeless, for example,
23 helped hundreds of homeless voters vote during the same-day
24 registration period, and this opportunity was so precious, as
25 our declarations have shown, because, without same-day

1 registration, they would have had to separately register by
2 mail on their own.

3 And as explained by Jack Frech, who is the director of
4 the Athens County Jobs and Family Services, who has worked with
5 low-income clients for over 30 years, many low-income voters
6 distrust the mail and are so afraid of filling out a government
7 form without help that they fear that it will lead to the
8 denial of benefits.

9 Being able to resolve registration issues and voting in
10 one shot has been so important especially because low-income
11 Ohioans move three times as frequently as their well-to-do
12 counterparts, meaning they have to update their registration
13 three times as frequently. And that assumes they even know
14 they have to update their registration, which many of them with
15 less educational background don't.

16 Now, with SB 238, that important opportunity is gone for
17 the very first time since Ohio created the in-person early
18 voting period.

19 Second, with respect to the elimination, or the ban, on
20 all weekday evening hours, the undisputed data in Exhibit 6
21 shows that lower-income Ohioans disproportionately rely on
22 weekday/evening voting, which is not a surprise, because people
23 who work in non-salaried lower-paying jobs have far less
24 flexibility to take time off work during regular business
25 hours. And, because they face even greater transportation

1 difficulties, evening voting has been especially valuable for
2 those who want to vote on the way home from work.

3 THE COURT: Let me ask you, do we have two separate
4 issues in this case: whether SB 238 is constitutional and,
5 secondly, can you separate the two: the early hours on
6 weekends and evening hours on weekdays?

7 MR. YOUNG: Your Honor, I don't believe that you can
8 separate the two, because, as the Sixth Circuit instructed in
9 the Libertarian Party case, you have to look at the combination
10 of all of these cut-backs together and look at their combined
11 impact on voters, especially low-income voters.

12 THE COURT: What impact do you think Obama for America
13 has since -- when you filed this complaint, there was a
14 preliminary injunction --

15 MR. YOUNG: Yes.

16 THE COURT: -- decided by this Court restoring the
17 last three days of voting. And then that decision was made
18 final in June after, of course, your complaint was filed.

19 How do you feel that the impact has been as a result of
20 this Court's restoration of the three days before a general
21 election?

22 MR. YOUNG: Well, Your Honor --

23 THE COURT: As, for example, in this coming November
24 election, every voter in Ohio will have the right to vote, in
25 person, the final three days before the Tuesday election. How

1 do you feel that impacts your case?

2 MR. YOUNG: Well, Your Honor, two ways, Your Honor:
3 Number one, first of all, we welcome the restoration of the
4 final weekend. Of course we do.

5 THE COURT: It hasn't been appealed. So, it's final.

6 MR. YOUNG: That's right. But that doesn't go far
7 enough, Your Honor, because we now, for the very first time in
8 Ohio early voting history, we have no evening voting. Hours
9 are not perfectly fungible. And, without evening voting, it
10 impacts those voters who have especially relied on that time.

11 THE COURT: Each county had discretion to open its
12 doors for evening hours and additional weekend hours; is that
13 correct?

14 MR. YOUNG: Yes and no, Your Honor.

15 In 2012, all counties had two weeks of evening voting.

16 THE COURT: I know that, but that was never challenged
17 since I had established -- ordered -- Secretary of State Husted
18 to establish suitable hours, or uniform hours, during that last
19 weekend before the election in 2012. But, other than that,
20 over the years, it's been the discretion of each county to
21 establish additional hours; evening hours, for example; right?

22 MR. YOUNG: That's correct, Your Honor. But, in 2010,
23 78 percent of the State's African Americans had access to
24 multiple Sundays for voting. That was in the 2010 mid-terms.
25 And --

1 THE COURT: I'm just trying to pull a distinction
2 here. It's because of the Secretary of State's directive. It
3 eliminated evening hours and additional weekend hours.
4 Correct?

5 MR. YOUNG: That's absolutely correct.

6 THE COURT: The Secretary of State took the discretion
7 away from the county boards of elections.

8 MR. YOUNG: That's exactly right, Your Honor.

9 In 2012, the period in which they used to have
10 discretion is now over. And that was a result, as Your Honor
11 is well aware, of a series of tie votes.

12 When boards of elections started voting along partisan
13 lines, Secretary of State Husted came in and, just right across
14 the board, eliminated all Sundays.

15 THE COURT: Right.

16 MR. YOUNG: It was only, of course, because of Your
17 Honor that we only got one Sunday back.

18 And then this year, again, across the board, this time,
19 he is eliminating all evenings for the first time in Ohio
20 history.

21 THE COURT: Of course, the reason was that not every
22 boards of election could agree on evening and weekend hours.
23 Right?

24 MR. YOUNG: That's true.

25 THE COURT: I believe only five counties were open in

1 the 2012 election, in addition to the limitations -- I lost my
2 train of thought. Someone came in the door.

3 But only five counties chose to be open, where other
4 counties couldn't agree, Montgomery County, for example. And
5 then Secretary of State Husted came in and, through the
6 directive to set hours for -- established hours for every
7 county in the State.

8 MR. YOUNG: That's correct, Your Honor.

9 THE COURT: And then --

10 MR. YOUNG: I apologize.

11 THE COURT: Go ahead.

12 MR. YOUNG: I believe that there were a series of
13 about four or five tie votes in 2012 where they couldn't agree.
14 And 'Defendant Husted, without waiting for any more tie
15 votes -- so, we actually don't know how many more there would
16 have been -- just kind of went right across the board and said
17 everyone has to have no Sundays and no weekend voting, at all,
18 until this Court restored the last weakened.

19 THE COURT: How did that authority evolve?

20 Maybe I should ask that of Secretary Husted.

21 MR. YOUNG: Well, that's an excellent question, Your
22 Honor. You know, under the State's statutes, it provides for
23 the Secretary of State to --

24 THE COURT: I understand.

25 MR. YOUNG: Yeah, you're right.

1 THE COURT: To break ties. I know that.

2 MR. YOUNG: Exactly.

3 THE COURT: But to establish across-the-board
4 directives, that's relatively new, I believe, in Ohio.

5 MR. YOUNG: It is relatively new, Your Honor. I
6 believe the statute only provides for emergency situations in
7 which you can do that.

8 THE COURT: Right. It covers all disagreements, not
9 just voting.

10 MR. YOUNG: Right. Exactly, Your Honor. I think
11 it's -- for emergency situations, I think it has to be within
12 90 days of the election. And, if there is any reason to
13 believe that it's going to be permanent, it has to go through a
14 comment process, which none of these directives went through.

15 So, you're right, Your Honor, that it's a little bit
16 troubling, the kind of procedures that went through to bring
17 this about.

18 But more to the point, Your Honor, the number of African
19 Americans who had access to multiple Sundays, to evening hours,
20 even in the 2010 mid-terms, we're talking about seventy-eight
21 to eighty-one percent of the State's African Americans. And
22 now that's gone. And that's why we're here today. And these
23 cutbacks for the evenings and the multiple Sundays do impose
24 significant burdens on many Ohio voters.

25 With respect -- and to answer Your Honor's question

1 about, you know, what happens after OFA, well, we have four
2 hours on a Sunday afternoon now, Your Honor, and that's
3 certainly better than zero. But, if I may, Your Honor, we have
4 to step back and really focus on the unique importance that
5 Sunday has to the African American community.

6 And I know Your Honor has read all of the briefs. So,
7 I'm not going to quote all of the declarations to you. But the
8 defendants don't even -- here is the point: The defendants
9 don't even dispute that Sunday voting is an African American
10 phenomenon.

11 You know we've quoted this individual many times as
12 saying that he's against Sunday voting because African
13 Americans use it. So, you have to keep that in context. And
14 we've also put forward declarations from people that have
15 described how one Sunday afternoon isn't enough to conduct all
16 of their "Souls to the Polls" activities.

17 In Exhibit 79, Your Honor, Reverend Snyder, from the
18 Bethel AME Church, one of our plaintiffs, describes that, on
19 Sundays, you have to pick people up, pick parents up from their
20 homes or their church, have them sign releases, drop their kids
21 off at church for babysitting, take them to the polls, take
22 them back from the polls, pick their children up, take them
23 back home. That whole process can take three to four hours,
24 and that's just for one trip.

25 And Jamie Simpson, from Omega Baptist Church, describes

1 how sometimes church services don't get out until 2:00 p.m.

2 The hours, now, are from 1:00 to 4:00. And so, Your Honor, one
3 Sunday just is not enough for many voters here in Ohio.

4 And if I may, Your Honor, turn to the justifications,
5 because Your Honor granted the motion to file an amicus brief,
6 I believe, Your Honor, that they don't -- well, they do,
7 actually, repeat a lot of the same things that they said in the
8 opposition brief, but they've kind of brought in a few new
9 pieces of evidence, and we haven't had a chance to depose any
10 of these individuals that they've brought in.

11 But, if I may, Your Honor, this OGA amicus brief focuses
12 on two justifications for SB 238. The first is voter fraud,
13 and the second is cost.

14 Now, with respect to voter fraud, as Your Honor well
15 knows, this is nothing more than, as defendants admit, a,
16 quote, specter. And they haven't put forth a single case of
17 voter fraud that same-day registration has caused. But let's
18 look at this new evidence that the OGA has put in on Friday.

19 First, one thing that I want Your Honor to pay attention
20 to is that each of these declarants are partisans and they're
21 leaders in the majority party leadership. So, that's one --
22 that reason, alone, is enough to question the credibility of
23 these individuals.

24 First, Alex -- one of the individuals, Alex
25 Triantafilou, -- I may be mispronouncing that -- he points to

1 two ballots that are cast during the same-day registration
2 period that were not counted because their registrations
3 weren't verified.

4 Your Honor, that just proves that the system works. And
5 the system is, when you cast a ballot during same-day
6 registration week and you register, your ballot is segregated.
7 And then the board of elections has weeks to verify your
8 registration, and your ballot isn't counted until your
9 registration is verified.

10 That system works, and there is no evidence to show that
11 it doesn't. That system was actually created by Secretary
12 Husted, and there is no evidence that it doesn't work. So,
13 these two votes that weren't counted because their registration
14 couldn't be verified, that proves the system works.

15 Second, Mr. Triantafilou points to four ballots that
16 weren't counted, but they should have been counted, because
17 they couldn't verify their registration in time, but their
18 inability to verify the registration in the 30 days has nothing
19 to do with same-day registration. They don't point to anything
20 unique to the same-day registration process that made it take
21 longer for them to verify those registrations.

22 Mr. Steven Cuckler points to a handful of instances
23 where people attempted to vote in two different counties, but
24 he doesn't explain, again, how the unique process of same-day
25 registration increases the possibility of double voting. Your

1 Honor, that's why we have a statewide voter registration
2 database: to catch these type of errors. So, you know, even
3 with their last-minute, you know, Hail Mary amicus brief, the
4 OGA still can't get its story straight on exactly what kind of
5 voter fraud that elimination of same-day registration is
6 supposed to prevent.

7 And the repeated failure -- you know, now this is their
8 second bite at the apple -- to justify SB 238 only underscores
9 how the specter of voter fraud is nothing more than a ghost
10 story.

11 Second, they talk about costs and administrative
12 convenience. And, Your Honor, we've been down this road, like,
13 many times.

14 As Your Honor recognized and as the Sixth Circuit
15 recognized, vague testimony about costs is not enough. You
16 have to show that the boards of elections have, quote,
17 struggled to cope with the voting restriction at issue. And
18 there is no evidence that they have struggled to cope with
19 same-day registration.

20 Now, in their amicus brief, they do try a few new
21 tactics. First, they try to put a price tag on how much
22 same-day registration will cost. But these price tags are
23 questionable at the outset because same-day registration
24 doesn't require them to have any more office hours than they
25 already have.

1 Second, you can't trust these declarations because -- I
2 mean, not only because they're written by partisans, but
3 because OGA is talking out of both sides of their mouths. They
4 say, wrongly, that no one uses same-day registration. And then
5 they say it costs, like, a lot of money to do same-day
6 registration.

7 Well, if no one is using it, then why is it costing so
8 much money? So, you can't really trust what they're saying.

9 And, third, even if you take these price tags at face
10 value, there is no evidence of the rest of the budget or any of
11 the other financial contexts to show that these costs are
12 unmanageable.

13 THE COURT: The costs are borne by each county.

14 MR. YOUNG: I'm sorry?

15 THE COURT: The costs are born by each county,
16 correct?

17 MR. YOUNG: Correct. The costs are borne by each
18 county.

19 THE COURT: So it's up to each county to budget, as
20 Cuyahoga County has pointed out in its amicus brief that it
21 believes the County has already budgeted for the 2014 election.

22 MR. YOUNG: That's right, Your Honor.

23 THE COURT: It would encompass early voting.

24 MR. YOUNG: Exactly. That's right, Your Honor.

25 And I would just direct Your Honor to the Sixth Circuit

1 case of Stewart v. Blackwell.

2 The Sixth Circuit said governments almost always attempt
3 to justify their conduct based on costs and administrative
4 convenience, which is why they have to show that these costs
5 are, quote, undue or unmanageable.

6 Now, some of these declarations do point to the fact
7 that budgets have been set in certain other counties; but, if
8 simply pointing to a budget were enough to justify burdening
9 the fundamental right to vote, then any voting restriction that
10 was passed before the end of the fiscal year would just be
11 automatically constitutional.

12 Again, the standard is whether it's unmanageable,
13 whether they've struggled to cope with these costs. And they
14 haven't met that standard.

15 And the last two rationales, Your Honor, you know, they
16 kind of abandon in their amicus brief. So, I don't know if I
17 should spend any time talking about it. But they talk about
18 the cost of campaigns being reduced and buyers' remorse.

19 THE COURT: I know.

20 MR. YOUNG: You can read our replies. Those defenses
21 aren't serious.

22 And, so, Your Honor, these proffered rationales just
23 don't justify the significant burdens imposed by Ohio's
24 redefinition of the early in-person voting period. And,
25 therefore, plaintiffs are likely to succeed on the Fourteenth

1 Amendment.

2 And, of course, you can't discuss the significant
3 burdens on Ohio low-income voters without also discussing the
4 clear impact that this will have on African Americans in Ohio.

5 And plaintiffs are also likely to succeed on their
6 Section 2 claim. The standard, as Your Honor knows, in *Stewart*
7 *v. Blackwell* is whether these cutbacks interact with social and
8 historical factors to cause African Americans to have less
9 opportunities to participate in the political process. And
10 plaintiffs have satisfied that standard.

11 First, there is no dispute that African Americans
12 dispute face vast socioeconomic disparities that make it
13 directly harder for them to adjust to the elimination of these
14 voting periods. And these statistics are important, but I'm
15 not going to reread them because Your Honor has read the briefs
16 and the defendants don't dispute any of these statistics.

17 And the reason we bring out these statistics -- they're
18 not just random statistics that we're just throwing at you.
19 It's precisely because of these socioeconomic disparities that
20 have made same-day registration and evening and Sunday voting
21 so important to the African American population, which is why
22 it will make it more burdensome for them to adjust to these
23 eliminations. And you can't divorce this from any of the other
24 social and historical context here.

25 We've listed many different ways in which Africans have

1 been excluded, or have been attempted to be excluded, from the
2 political process. Again, I will not reread the parts of the
3 brief where we lay those out.

4 So, when you consider all of these factors, the
5 elimination of same-day registration and early voting hours
6 most needed by the African community, it's no accident, Your
7 Honor, but it's a product of all of these social and historical
8 factors coming together, sort of making it --

9 THE COURT: The total impact --

10 MR. YOUNG: Exactly, Your Honor.

11 As the Sixth Circuit said, it's an intensely local
12 appraisal. You look at all of these factors in combination.

13 Now, let's get to the -- I will briefly get to Your
14 Honor's most favorite part of this case, which is the experts.

15 The fact that African Americans clearly have a harder
16 time adjusting to these eliminations is enough to show a
17 disparate impact, but plaintiffs have also demonstrated that
18 African Americans indeed disproportionately use early voting in
19 Ohio.

20 First, we have five undisputed studies, many of which
21 Your Honor relied on in OFA, from Exhibits 4 to 8, which all
22 show a clear disproportionate impact on African Americans. We
23 have a board of elections admission that Sunday voting is an
24 African American phenomenon. And then we have three separate
25 analyses conducted by Dr. Daniel Smith, who, as you know, is a

1 tenured professor of political science at the University of
2 Florida.

3 And let me just back up a second, for a second, before I
4 just talk briefly about these methods of analyses here.

5 Ohio doesn't keep its voter data -- doesn't keep race in
6 its voter data files. So, we don't know the race of a
7 particular individual who votes. And this is in contrast to
8 other states who do keep that data, like North Carolina and
9 Florida. And, so, it's very easy in those states to just see,
10 immediately, which percentage of what race is voting when.

11 In Ohio, you can't do that. And, so, that's partly why
12 Dr. Smith uses multiple different methods to try to
13 demonstrate, try to see, are there many independent indicators
14 showing that African Americans disproportionately rely on early
15 voting.

16 And just a quick reminder, Your Honor, our burden is not
17 to prove beyond a reasonable doubt or to a mathematical
18 certainty that "x" many African Americans voted on "y" day.
19 Our burden is preponderance of the evidence. And we think we
20 -- and we have amply satisfied that standard.

21 First, Dr. Smith runs a regression analysis, which
22 simply compares the percentage of the black voting age
23 population in a census block and how often people from that
24 census block cast a vote. And we see that, as the percentage
25 of African Americans increases in a census block, the

1 percentage of early voting usage increases as well. And
2 defendants don't dispute that all of his regressions show a
3 positive statistically significant relationship between those
4 two factors. And what that --

5 THE COURT: Instead of preponderance of the evidence
6 as the test, isn't it clear and convincing evidence? We're in
7 equity.

8 MR. YOUNG: We are in equity. I believe that the
9 burden is preponderance of the evidence; and, in this posture,
10 we're to show that we're more likely than not to succeed. And
11 we believe that we've met that standard.

12 And, even if the burden is clear and convincing, Your
13 Honor, we believe we have met that standard as well, because
14 defendants haven't performed any analysis that shows a negative
15 relationship, for instance, between African Americans and early
16 voting usage.

17 So, he runs a regression that shows a positive
18 statistically significant relationship.

19 Defendants proffered expert, Dr. Nolan McCarty,
20 submitted a rebuttal report last Friday. He runs six different
21 regression analyses.

22 Now, we haven't had a chance to depose him or understand
23 what it is that he did exactly, but each one of those six
24 regression analyses show a positive statistically significant
25 relationship.

1 Then Dr. McCarty runs a, quote, non-linear regression
2 analysis. And those two analyses show a positive relationship
3 between race and early voting usage.

4 So, no matter how many times you want to slice the data
5 here, you're showing a positive statistically significant
6 relationship.

7 On top of that, Your Honor, Dr. Smith runs a homogeneous
8 analysis, which looks at census blocks which are one hundred
9 percent black or one hundred percent white, which, by the way,
10 a majority of Ohio's census blocks are all black or all white,
11 you know, unfortunately. And voters from all-black census
12 blocks consistently vote at higher rates than voters from
13 all-white census blocks. Defendants quibble about some of the
14 underlying data, but they're not disputing the accuracy of
15 Dr. Smith's analysis.

16 And, lastly, Dr. Smith does the method of bounds
17 analysis, which looks at census blocks with ninety percent or
18 more of one particular race. And that covers over seventy-five
19 percent of Ohio's population. And, again, it shows a racial
20 disparity.

21 Now, Dr. -- or, again, it shows that voters from those
22 predominantly African American census blocks are voting at
23 early voting higher than white.

24 Now, Dr. McCarty, defendants' expert, says in his first
25 report that he should have done the method of bounds analysis

1 differently.

2 Well, Dr. Smith took Dr. McCarty's suggested formula,
3 applied it. And again it shows a difference in the usage of
4 early voting between blacks and whites.

5 And, lastly, Dr. Smith relies on U.S. Census Bureau
6 surveys from 2008 and 2012 which show a vast racial disparity
7 between blacks and whites usage of early voting. In 2008, you
8 had double the use of early voting by blacks. In 2012, you had
9 triple the use of early voting by blacks.

10 So, you know, all of these -- all of these different
11 methods, put together, Your Honor, plaintiffs have amply
12 satisfied that, whatever burden of proof, whether it's
13 preponderance or clear and convincing, we have amply satisfied
14 our standard of showing that African Americans
15 disproportionately rely on early voting.

16 And if I can just briefly, Your Honor, address this
17 vote-by-mail issue, you know, as Your Honor well knows, this is
18 the same argument that was raised in OFA, and it was rejected.
19 And the Sixth Circuit rejected it. And the defendants had
20 argued that vote-by-mail provides, quote, ample opportunities,
21 and the Sixth Circuit rejected that argument. But I wanted to
22 add that, you know, there is a good reason why that argument
23 was rejected.

24 For many low-income and African voters -- and this is,
25 again, in our declaration -- vote-by-mail is separate but not

1 definitely not equal. The data shows that low-income and
2 African Americans vote by mail at lower rates. And the
3 undisputed declarations describe how African American
4 communities tend to distrust vote by mail and want to see their
5 votes actually processed.

6 For example, David Morgan, from the A. Philip Randolph
7 Institute of Trumbull, explains: "The African American
8 community had to fight to earn the right to vote." So, the
9 ability to actually go to a voting site and cast a ballot is
10 empowering and especially important for some of the older
11 members of the community.

12 And keep in mind this is made even worse by SB 205,
13 which was passed this year, which allows election officials to
14 throw out mail-in ballots for not being, quote, complete,
15 whatever that means. And that makes them more likely that
16 people will need more in-person help in filling out these
17 ballots.

18 And, so, that's why the District Court, in the Spirit
19 Lake case, was correct in recognizing that many of the Native
20 American tribes in that case distrust mail and would be
21 deterred from voting.

22 In sum, Your Honor, African Americans suffer an
23 undisputed host of socioeconomic disparities. Several factors
24 are working together to make it more difficult for them to
25 participate in the political process, and African Americans

1 disproportionately rely on early voting more than whites. So,
2 we've shown that these cutbacks interact with social and
3 historical factors to result in unequal opportunities for
4 African Americans to participate in the political process.

5 Lastly, Your Honor, just very briefly, on the remaining
6 preliminary injunction factors, no dispute: Fundamental right
7 to vote is irreparable harm.

8 With respect to the balance of equities, defendants --
9 again, it's the same thing as in OFA. They simply rely on
10 generic declarations about costs, but they don't establish that
11 they will, quote, be unable to cope with the remedy that we're
12 seeking here. And that's fatal to their claim, Your Honor.
13 And, as far as the public interest, it favors permitting as
14 many qualified voters to vote as possible. And, for all of
15 these reasons, plaintiffs' Motion for a Preliminary Injunction
16 should be granted.

17 If I may reserve some time for rebuttal?

18 THE COURT: Thank you.

19 MR. VOIGT: May it please the Court, my name is Steven
20 Voigt. And I represent the Secretary of State and the Attorney
21 General.

22 I will be speaking today about plaintiffs' Voting Rights
23 Act claim and Secretary of State Directive 17. And then I will
24 turn over the podium to my colleague, Mr. Armstrong, who will
25 discuss plaintiffs' Fourteenth Amendment claim and Senate Bill

1 238.

2 Plaintiffs are not entitled to a preliminary injunction.
3 And, with all due respect to my opposing counsel, he stated the
4 standard incorrectly.

5 Plaintiffs have failed to legally and factually prove by
6 clear and convincing evidence that they have a strong
7 likelihood of winning at trial. That is the standard before
8 the Court today.

9 Ohio provides its citizens far more opportunities to
10 vote than do most other states. Twenty-three states do not
11 allow no excuse mail-in voting. Ohio does. That means an
12 Ohioan can vote entirely by mail without ever going to a ballot
13 box, without ever going to the board of elections.

14 In the upcoming election, the Secretary of State will be
15 mailing unsolicited applications for ballots to nearly all of
16 Ohio's registered voters. In 18 states, including large states
17 such as Pennsylvania, Missouri and New York, voting is
18 available on only one day, Election Day. No state with an
19 African American population share equal to or greater than the
20 African American population share of Ohio offers more EIP
21 voting days than does Ohio.

22 The average EIP voting period across all jurisdictions
23 is between 12 and 13 days. Ohio's EIP days in the upcoming
24 election will be spread across 28 days. The average number of
25 EIP -- and, when I say "EIP," I mean early in-person voting.

1 The average number of EIP voting days across all jurisdictions
2 is 11. Ohio, in the upcoming election, has twice that number,
3 22. That consists of 188 EIP hours in addition to the 13 hours
4 of voting on Election Day. Twenty-eight jurisdictions do not
5 offer any EIP voting on the weekends. Ohio has two Saturdays
6 of EIP voting and one Sunday, and Ohio is only one of nine
7 jurisdictions that offers any EIP voting on a Sunday.

8 The breadth of Ohio's laws cannot be denied. Even
9 plaintiffs' own expert, Professor Roscigno, agreed that Ohio's
10 voting opportunities are virtually unlimited because an Ohioan
11 can simply put his or her ballot in the mailbox at any time of
12 the day.

13 Needless to say, the implication of plaintiffs' claims
14 could be profound. If Ohio's laws are found to violate the
15 Voting Rights Act, then this would mean that the laws of most
16 other states also violate the Voting Rights Act. Such a
17 premise cannot be.

18 Plaintiffs claim that the days and hours set forth in
19 Directive 17 are invalid under the Voting Rights Act, but
20 plaintiffs have failed to specify to this Court the days and
21 hours for early in-person voting that they claim would be
22 permissible under the Voting Rights Act, and plaintiffs have
23 not offered any evidence to support whatever it is they claim
24 would be permissible.

25 In other words, plaintiffs are saying that Ohio falls

1 short of some unknown line, and they haven't specified what it
2 is that Ohio has to do to get across that line, and they
3 haven't introduced any evidence supporting their position.

4 Most of the evidence that the plaintiffs have put
5 forward relates to the 2012 presidential election, which, of
6 course, was an historic election involving an historic
7 presidency.

8 There are significant differences between presidential
9 and non-presidential elections, as this Court recognized in the
10 June, 2014, Obama for America opinion where this Court declined
11 to mandate specific voting hours in the 2014 mid-term election
12 based on the 2012 election because, quote, historically, voter
13 turnout is lower in a non-presidential election year.

14 THE COURT: Just as a reminder, though, the issue was
15 different before the Court in the Obama case. Counsel for both
16 sides asked me, directly, to determine appropriate hours. And
17 that was my response.

18 MR. VOIGT: Okay.

19 THE COURT: It's a different issue. It wasn't before
20 me -- what we have today was not before me in Obama for
21 America.

22 And counsel for both sides -- actually, the plaintiff in
23 that case asked me to set the same hours as the directive that
24 I had ordered back in -- instead, I ordered him to set hours
25 back in 2012. They asked for the same hours.

1 So, the remedy is different here than the remedy that
2 was requested in Obama for America.

3 MR. VOIGT: Your Honor, I apologize if I
4 misinterpreted your opinion. But I think my point is that --

5 THE COURT: Well, it was a different animal.

6 MR. VOIGT: I understand. And my point is the
7 presidential years and non-presidential years.

8 THE COURT: Yeah, I understand that. And that was the
9 difficulty I had with it, too.

10 I mean, let's get real. Not the same number of voters
11 vote in a non-presidential election year.

12 MR. VOIGT: Right.

13 THE COURT: For example, this year, the turnouts are
14 very poor, frankly. We all know that, over the years,
15 historically. But more Ohio voters will vote in a presidential
16 election than they will in the gubernatorial election this year
17 and other countywide elections. And then, in odd number years,
18 it's even worse. There is not much on the ballot except
19 municipal races and some other things, school levies, I guess,
20 and so forth.

21 MR. VOIGT: And, Your Honor, --

22 THE COURT: You can't compare the two. This is
23 something I have to deal with. And the remedy, you know, if
24 plaintiffs succeed, is something I have to ponder.

25 To be fair to all Ohio voters, that's what it's all

1 about.

2 MR. VOIGT: Yes, Your Honor. Actually, --

3 THE COURT: While I'm at it, though, there is one
4 thing I wanted to point out.

5 The brief filed by the Attorney General of the United
6 States disputes your claim that I should compare Ohio's liberal
7 voting to other states. The Attorney General argues that
8 Section 2 requires an intensely local appraisal, not a
9 comparison to other states.

10 MR. VOIGT: And I respectfully disagree with that.

11 The prior cases -- the prior courts that have looked at
12 this -- and I'll get to this in a bit, but the prior courts
13 that have looked at this looked at a comparison of the voting
14 laws in the -- the challenged voting legislation against other
15 legislation in other states, including the Brown court,
16 which -- the Brown decision in Florida, which I'll get to.

17 And I think -- the issue here is having the opportunity
18 to vote. And, so, it clearly -- when you are comparing a
19 regime in one state with opportunities in other states, it's a
20 helpful -- it's a helpful -- I'm not saying it's dispositive,
21 you know, reasoning; but it's a helpful comparison as to
22 whether or not there is an equal opportunity.

23 THE COURT: I think both sides are relying on the
24 Gingles case. Aren't you as well?

25 MR. VOIGT: We are, Your Honor. We had a discussion

1 on some points, yeah, --

2 THE COURT: What did the Attorney General state that
3 --

4 MR. VOIGT: -- although that was a dilution case.

5 THE COURT: That's where the language came from,
6 "intensely local appraisal of the challenged practice or
7 procedure," cited in Gingles.

8 MR. VOIGT: Right. To distinguish that, the Gingles
9 case was a vote-dilution case, rather than vote-denial case.

10 THE COURT: I understand.

11 MR. VOIGT: The cases that we're dealing with here are
12 somewhat novel in that there have been very few vote-denial
13 cases thus far. And, so, many of the frameworks that exist out
14 there were set forth under a different context, and
15 specifically in vote-dilution type context, or Section 5
16 context under the Voting Rights Act.

17 THE COURT: Well, the Attorney General also rejects
18 your argument when it stated in its brief that the plaintiffs
19 claimed errors of vote-denial claim, not a vote-dilution claim.

20 Did you read the --

21 MR. VOIGT: No. No. I think that we agree. The
22 plaintiffs are claiming a vote-denial claim.

23 THE COURT: Right.

24 MR. VOIGT: Right. Yes.

25 THE COURT: Maybe I heard you wrong before, but I

1 thought you said this was a vote -- that Gingles applies to a
2 vote-dilution claim.

3 MR. VOIGT: The point that I made was -- well, the
4 Gingles makes a lot of various propositions, but the underlying
5 issue in Gingles -- and we cited to it for various
6 propositions -- the underlying issue there was a vote-dilution
7 situation.

8 THE COURT: Okay.

9 MR. VOIGT: And, then, my only point is that the law
10 is not tremendously developed in this particular area.

11 THE COURT: I agree with you. Okay.

12 MR. VOIGT: And, so, we were talking about the
13 differences between presidential and non-presidential years.
14 And this brings me to the next point.

15 Directive 17 accounts for the differences in turnout
16 between presidential and non-presidential year elections.

17 In 2016, for instance, there will be more voting hours
18 than there will be in 2014, and there will also be evening
19 hours.

20 As for Sunday voting, which plaintiffs' counsel
21 mentioned, there was one Sunday of EIP voting in 2012, as there
22 will be one Sunday of EIP voting in 2014.

23 Plaintiffs should not have waited until just months
24 before the 2014 election to challenge the Sunday voting
25 schedule that they could have challenged back in 2012.

1 Not only have plaintiffs failed to meet their factual
2 burden; but, on many critical issues, plaintiffs have
3 introduced absolutely no evidence at all. There is nothing in
4 the record showing that African Americans vote EIP at a higher
5 rate than whites during the evenings.

6 Plaintiffs have introduced no evidence related to Ohio's
7 mail-in voting opportunities. Plaintiffs have introduced no
8 evidence indicating that African Americans will use mail-in
9 voting in the upcoming 2014 election to a lesser extent than
10 whites.

11 Of course, the upcoming 2014 election is a
12 non-presidential year election. Plaintiffs have introduced no
13 evidence with respect to early in-person voting turnout across
14 demographics for the entire State of Ohio for any mid-term
15 election. This is an extremely important point. Plaintiffs
16 have introduced no evidence indicating that individuals always
17 vote on the same day at the same time and using the same
18 method.

19 What plaintiffs are saying is that people won't vote
20 under Directive 17 -- people won't vote under the days and
21 hours set forth in Directive 17, but there is absolutely no
22 evidence of that. There is no evidence in the record
23 indicating that the turnout in the upcoming election will be
24 anything remotely close to the turnout in a presidential year
25 election.

1 So, what evidence have plaintiffs put forward?

2 Well, plaintiffs proffered expert, Dr. Smith, put
3 together a couple of charts. And these charts make two basic
4 points.

5 First, African American voting on -- African American
6 EIP voting before election days on Sundays is actually pretty
7 low, with the possible exception of the final Sunday before
8 Election Day. And the final Sunday before Election Day is an
9 EIP voting day under Directive 17.

10 The second point is that, in his opinion, the highest
11 African American EIP voting days are the final seven days
12 before Election Day. Again, under Directive 17, those seven
13 days are EIP voting days.

14 So, even taking plaintiffs' evidence and lack of
15 evidence at its face value, plaintiffs have failed to meet
16 their burden.

17 In addition to the fact deficiencies that preclude
18 plaintiffs from an injunction, plaintiffs' claims also fail for
19 various legal reasons which are set forth in detail in our
20 opposition brief, but I briefly wanted to mention three of
21 those reasons today.

22 First, plaintiffs are confusing Section 2 and Section 5
23 of the Voting Rights Act. We even heard opposing counsel
24 mention that during his presentation, which I'll get to at the
25 end.

1 Plaintiffs are asking the Court to compare Directive 17
2 with the days and hours of EIP voting that existed previously.
3 This is called a regression analysis, and it is proper only in
4 a Section 5 context. Ohio is not a preclearance state and
5 Section 5 does not apply here. Therefore, a regression
6 analysis is not proper.

7 Second, instead of asking whether all Ohioans have
8 access to the political process, plaintiffs want this Court to
9 consider whether there is a disproportionate impact of the new
10 laws.

11 Again, this is not the correct analysis, because it is
12 part of a Section 5 analysis.

13 The plain language of Section 2 of the Voting Rights Act
14 speaks of the opportunity to participate in the political
15 process.

16 And I'd like to point out that other courts have
17 rejected the arguments that plaintiffs have put forward. By
18 way of example, the Brown decision, from Florida, denied an
19 injunction trying to expand a much more limited EIP period
20 consisting of 48 to 96 hours of EIP voting over eight days.

21 If 48 to 96 hours of EIP voting is permissible,
22 certainly 188 hours of EIP voting must be permissible.

23 Just last Friday, three days ago, in a case called NAACP
24 versus McCrory, which we filed as a supplemental authority over
25 the weekend --

1 THE COURT: Right.

2 MR. VOIGT: -- the District Court of North Carolina
3 denied an injunction challenging ten days --

4 THE COURT: When did that opinion come out?

5 MR. VOIGT: It came out on Friday.

6 THE COURT: You submitted it. It's 120 pages, I
7 believe?

8 MR. VOIGT: Yes.

9 THE COURT: I haven't had a chance -- I learned about
10 it this morning, of course, because you just filed it. But it
11 was not your fault that you filed it on Friday, I guess, if the
12 opinion wasn't --

13 MR. VOIGT: Yes, Your Honor. In other words, the
14 opinion came out after the briefing.

15 THE COURT: Right.

16 MR. VOIGT: But we felt that it was relevant to the
17 discussion.

18 So, in that opinion, the District Court in North
19 Carolina denied an injunction challenging ten days of EIP
20 voting.

21 Again, if ten days of EIP voting is permissible,
22 certainly 22 days must be permissible.

23 I also think it's important to call out two portions of
24 the North Carolina opinion. And I recognize you haven't read
25 it yet, but I just wanted to point to these two points.

1 First, in Footnote 61 of the opinion, the Court stated
2 that, quote: Plaintiffs have cited no decision from any court
3 finding a state in violation of Section 2 for failing to
4 maintain a particular number of early voting days.

5 The same failure of proof, the same failure to find any
6 case supporting their position, is present in this case.

7 Second, on page 103 of the opinion, the North Carolina
8 District Court held that plaintiffs had failed to meet their
9 burden of proof, and there was nothing more than speculation
10 that certain demographics would not use the early voting
11 opportunities under the challenged legislation.

12 Again, speculation and absence of proof is what we have
13 here.

14 A third legal failure is that plaintiffs are unable to
15 prove causation. They have not shown that a single person will
16 be denied the ability to vote based on Ohio's extremely
17 expansive voting opportunities.

18 The only mid-term election Dr. Smith considered was
19 2010, but Dr. Smith's analysis of 2010 was limited to only a
20 portion of five counties in Ohio, and Ohio has 88 counties.
21 Dr. Smith, himself, stated that his conclusion should not be
22 generalized to the entire State of Ohio.

23 In contrast with Dr. Smith's report, one of defendants'
24 experts, Sean Trende, ran calculations on all of Ohio's
25 counties in 2010 and found no statistical difference between

1 African American and white EIP voting. And, again, that was in
2 2010.

3 Your Honor, the correct inquiry is whether, under the
4 totality of circumstances, the political process is equally
5 open.

6 Plaintiffs have put forward no evidence that one of the
7 most liberal voting regimes across all of America somehow
8 denies Ohioans the opportunity to vote. And, as a final
9 point -- by the way, I wanted to just touch on a couple of
10 things the plaintiff said after I mention this.

11 THE COURT: All right.

12 MR. VOIGT: But, as a final point, early in-person
13 voting and early mail-in voting are both forms of absentee
14 voting. Okay?

15 It is well established that there is no constitutional
16 right to absentee voting unless there is -- unless there is no
17 other opportunity to vote, such as voting on Election Day. And
18 we see that in many states, where there is voting on only one
19 day, Election Day.

20 So what, in essence, plaintiffs are doing here is,
21 they're raising policy arguments that are better directed to
22 the legislature, and not to this Court.

23 Respectfully, their motion should be denied.

24 And, if I may, Your Honor, I would like to address just
25 a few points in plaintiffs counsel's presentation.

1 THE COURT: Of course.

2 MR. VOIGT: As I mentioned, they set forth the wrong
3 standard before the Court. The correct standard is clear and
4 convincing evidence.

5 During counsel's presentation, he admitted that he is
6 arguing about the elimination of specific voting hours.

7 Again, this is a regression analysis, comparing the old
8 hours against the new hours. Case after case has said that
9 this is not the proper analysis under Section 2. That's a
10 Section 5 analysis.

11 Plaintiffs' claim that there is a ban on evening hours
12 is incorrect. Directive 17 sets different hours for different
13 elections.

14 In 2014, there will be 13 hours of voting on Election
15 Day and two Saturdays and one Sunday.

16 In 2016, a presidential election, there will be more
17 hours, including evening hours.

18 And Directive 17 was specifically set up based on the
19 bipartisan recommendation of the OAE0, which has input from all
20 of Ohio's counties, with an effort to balance the needs of
21 small, medium, and large counties to come up with a uniform
22 system that would treat everyone fairly.

23 And, by the way, the ACLU has been arguing for
24 uniformity, as we set forth in our briefs.

25 THE COURT: Right.

1 MR. VOIGT: Plaintiffs' claims seem to be based on the
2 convenience of GOT, or Get-Out-the-Vote efforts. But that's
3 not the correct test. The test is whether, under the totality
4 of circumstances, the political process is equally open.

5 I think plaintiffs would have a hard time arguing that
6 one of the most liberal voting regimes in America -- under one
7 of the most liberal voting regimes in America the political
8 process is not equally open to all Ohioans.

9 Opposing counsel briefly mentioned 2010. In 2010, the
10 boards of election had discretion to set their own hours. In
11 the vast majority of cases -- the vast majority of counties had
12 no evening hours and shorter hours than exist under
13 Directive 17.

14 Plaintiffs' counsel also mentioned Secretary of State
15 Husted's decisions to break ties of the boards of elections.
16 When Secretary of State Husted broke those ties, he broke them
17 in favor of the boards' normal business hours.

18 Also, I believe there may have been a misstatement about
19 the length of time that no-fault early in-person voting has
20 been in existence.

21 Here in Ohio, no-fault early in-person voting of the
22 types of mail-in, no-excuse and in-person voting has been in
23 existence only since 2005.

24 THE COURT: Right. I didn't hear anything.

25 MR. VOIGT: I'm sorry. I may have misheard, and I

1 apologize for that, but I just wanted to clarify that.

2 THE COURT: Okay.

3 MR. VOIGT: And, lastly, the plaintiffs have quoted to
4 one individual who made some unfortunate and improper remarks,
5 and they somehow seek to use that to prove that Senate Bill 238
6 and Directive 17 are discriminatory or passed with a
7 discriminatory intent.

8 That was one individual. And, by the way, the
9 individual was a Franklin County member of the board of
10 elections. He was not a member of the General Assembly. He
11 was not a member of the Secretary of State's staff. Plaintiffs
12 have introduced nothing else and can't genuinely claim that
13 Directive 17 was passed with a discriminatory intent.

14 Thank you for your time. And I'll pass the podium over
15 to my colleague.

16 THE COURT: Thank you.

17 MR. ARMSTRONG: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. ARMSTRONG: Thank you for indulging us with two
20 bites at this apple.

21 THE COURT: Sure.

22 MR. ARMSTRONG: Assistant Attorney General Kris
23 Armstrong. I'm lead counsel for the Attorney General in this
24 case. And I will be addressing some different points from what
25 Mr. Voigt addressed. I'm going to talk about some of the facts

1 regarding SB 238, and then talk about some points of law
2 regarding the Fourteenth Amendment claims as relate to both
3 SB 238 and Directive 2014-17. But, first, a few facts with
4 respect to Golden Week, which is the main issue with respect to
5 SB 238.

6 As Your Honor knows from reading the briefs, prior to SB
7 238, there was approximately a week at the very beginning of
8 the early voting period where voters could register to vote and
9 could vote on the same day. However, as plaintiffs' own
10 expert, Professor Smith, acknowledges, very few voters actually
11 took advantage of the essence of Golden Week, which was the
12 ability to register and to vote on the same day.

13 In the 2012 General Election, according to Dr. Smith's
14 report, only five-and-a-half percent of voters who were
15 registered to vote during Golden Week actually went on and cast
16 their ballot during Golden Week. The other ninety-four-and-
17 a-half percent of people who came in and registered during
18 Golden Week either didn't vote or waited until later in the
19 voting cycle to vote. And there is no evidence in the
20 record -- none -- regarding what percentage of the small number
21 of Ohioans who did register and vote during Golden Week, that
22 five-and-a-half percent, were African American or any other
23 race. We just don't know what race they were. There is no
24 evidence in the record that African American voters in Ohio
25 utilized same-day registration and voting at rates higher than

1 whites or other voters.

2 The best plaintiffs have with respect to Golden Week --
3 and, again, the essence of Golden Week being that you can
4 register and vote on the same day -- is some studies in other
5 states showing a modest increase in voter turnout in general,
6 across all voters, where same-day registration was introduced.

7 But, as Professor McCarty, one of the Defendants'
8 experts, testified, the same-day registration -- quote,
9 unquote, same-day registration laws in those states that were
10 studied in the studies that plaintiffs have submitted were so
11 different from Ohio's version of same-day registration as to
12 not really be probative of any changes -- the results of any
13 changes in Ohio's law.

14 The states in those studies permitted registration
15 either on Election Day itself or much closer to the election
16 than Ohio's former system in which same-day registration and
17 voting were only offered for a short time a month before the
18 election, which is a time when many voters are simply not yet
19 engaged, as illustrated by the fact, again, that
20 ninety-four-and-a-half percent of voters who registered during
21 Golden Week in 2012 waited until later to come back and cast
22 their votes.

23 It's undisputed in the academic literature and in this
24 case that the vast majority of voters vote closer to the
25 election.

1 Finally, with respect to the studies that they've
2 submitted, as plaintiffs have been keen to note in many of the
3 depositions, including Dr. McCarty's, those studies all dealt
4 with the effect of adding same-day registration. There are no
5 studies that have been cited showing a reduction in turnout
6 from eliminating same-day registration.

7 Moreover, Ohio is far from alone in not having same-day
8 registration under the current law. As shown in Sean Trende's
9 report, 35 other states, including large states like Ohio, with
10 equal or greater African American population shares than Ohio,
11 including New York, Pennsylvania, Michigan, and Missouri, all
12 do not have any form of same-day registration.

13 Finally, as shown in the declarations from various board
14 of elections officials that the General Assembly submitted and
15 which would be submitted at trial in this matter, Ohio's choice
16 to eliminate same-day registration does relate and will achieve
17 important government interest, including reducing the potential
18 for fraud by giving the boards of elections a better
19 opportunity to verify the registrants' identity before allowing
20 them to cast a ballot.

21 THE COURT: What proof is there that you can give to
22 this Court that voter fraud accelerated after 2005?

23 MR. ARMSTRONG: Your Honor, I don't believe that that
24 is in evidence, and that's -- that's not something that we're
25 claiming.

1 I think what's being claimed is that same-day
2 registration is one aspect of the voting regime that makes it
3 more difficult to verify people's identities before they're
4 allowed to cast a ballot.

5 The other measures -- the measure was supported by the
6 OAE0 bipartisan organization comprised of Ohio's election
7 officials. These are the people who are the boots on the
8 ground who are dealing with this day in and day out who
9 supported the elimination of same-day registration.

10 Finally, I would also note that, in the case that
11 Mr. Voigt mentioned, the North Carolina vs. McCrory case, or
12 North Carolina NAACP vs. McCrory case, the Court on Friday
13 denied a preliminary injunction on claims challenging the
14 elimination of same-day registration and the shortening of the
15 early in-person voting period, among several others. And we've
16 submitted a copy of that.

17 Now I would like to make several points regarding the
18 Plaintiffs' Fourteenth Amendment claims, Your Honor.

19 First, it has long been settled by the U.S. Supreme
20 Court that there is no constitutional right to an absentee
21 ballot, as Mr. Voigt mentioned, unless there is no opportunity
22 to vote on Election Day.

23 Similarly, there is no constitutional right to same-day
24 registration.

25 The Supreme Court has sanctioned the registration

1 deadline 30 days before the election in the Crawford case.

2 So, the question before this Court, then, is whether
3 Ohio's choice to go above and beyond the constitutional floor
4 and have early voting on 22 of the 28 days before the election,
5 with registration ending on the 29th day before the election,
6 violates the Fourteenth Amendment. It doesn't for several
7 reasons.

8 First, as argued in our brief, we believe the proper
9 test here is the rational basis test under the McDonald case,
10 but that's argued in our brief.

11 I'm going to go ahead and address the Anderson/Burdick
12 test, because that is something that was applied in North
13 Carolina and I think this Court has applied in the past.

14 In the event Anderson/Burdick does apply, plaintiffs
15 still can't show a likelihood of success on the merits.

16 First, as in the North Carolina case, plaintiffs cannot
17 show that the lack of same-day registration imposes a severe
18 burden on anyone's right to vote.

19 There is no way this could be so as the Supreme Court,
20 in Crawford sanctioned the registration deadline 30 days before
21 the election where no early voting is offered, and there is no
22 constitutional requirement to provide early voting at all.

23 So, if Ohio's lack of same-day registration severely
24 burdens voters, then so does the voting laws of 35 other
25 states.

1 Ohio's law requiring that registration end before early
2 voting begins isn't the type of restriction that imposes a
3 severe burden. To the contrary, it's a reasonable,
4 nondiscriminatory restriction on the right to vote.

5 Similarly, Ohio's provision of 22 days of early voting,
6 including two Saturdays and a Sunday, coupled with 13 hours on
7 Election Day which include evening hours, cannot impose a
8 severe burden on Ohio's voters as Ohio is not required,
9 constitutionally, to offer any early voting at all.

10 If New York's voting laws are constitutional, Ohio's,
11 which go far beyond and, in fact, offer more opportunity than
12 42 other jurisdictions, including the District of Columbia,
13 are, too.

14 The retrogression analysis that plaintiffs urge, which
15 is comparing the opportunity under the current law with the
16 opportunity under the prior law, has no more place in the
17 Fourteenth Amendment analysis than it does under a Section 2
18 analysis. In fact, it would be an affront to the very essence
19 of the Equal Protection Clause if that clause prohibited Ohio,
20 because it once offered a 35-day early voting period, from
21 reducing it to 28 days but would allow New York or another
22 state never having offered early voting to continue to do so,
23 thereby creating inequality amongst the states. But even if
24 it somehow did -- even if it somehow did, plaintiffs have
25 failed to present any evidence that African American voters

1 would be severely burdened by the changes that plaintiffs
2 challenge.

3 There is no evidence in the record that African
4 Americans whose previously voted on days during which the polls
5 aren't open in 2014 will not simply switch to a different day.

6 Plaintiffs' expert, Professor Smith's, report in this
7 case contains no data on that. Professor Smith's report is
8 descriptive, but it is not predictive. It merely attempts to
9 establish what voting mechanisms African Americans have used in
10 the past.

11 And I would point out, with respect to Professor Smith's
12 report, I would urge Your Honor to read the depositions and the
13 reports of Professors Brunell and McCarty, who are professors
14 at the University of Texas at Dallas and Princeton University,
15 respectively, who take issue with many of the methodologies
16 utilized in Dr. Smith's report, not only the regression
17 analyses that are used, regression being a statistical
18 methodology that's distinct from retrogression, which is the
19 Section 5 analysis that plaintiffs are urging, just for
20 clarity.

21 We also take issue with his data collection. It's
22 unclear that a lot of the data that Professor Smith relied on
23 is actually accurate given the inconsistencies in coding what
24 days people vote at the various counties' boards of elections.
25 It's entirely possible that votes were not necessarily recorded

1 on the dates in the early voting period in which they were
2 actually cast.

3 So, the important thing is that Professor Smith's report
4 contains no data on what any group of voters will do in the
5 future, but plaintiffs have introduced a study into the record
6 that addresses that issue, but it undercuts their claims.

7 If Your Honor looks at Exhibit 5 of Professor McCarty's
8 deposition, that's a study that was done by plaintiffs' own
9 expert, Professor Smith, and a co-author, Michael Herron.

10 In that study, Professors Smith and Herron looked at
11 what happened to voter turnout after Florida reduced the number
12 of early in-person voting days from fourteen to eight and
13 eliminated same-day registration -- I'm sorry -- and eliminated
14 the first Sunday.

15 I didn't mean to say same-day registration. I should
16 correct that.

17 They eliminated the final Sunday of early voting. They
18 did this between the 2000 election and the 2012 election. So,
19 they reduced the number of voting days, and they eliminated the
20 final Sunday of early voting.

21 What Professor Smith and Herron found was that African
22 Americans did utilize early in-person voting less in 2012 than
23 they had in 2008. That was true. But, importantly, as set
24 forth in Table 3 of the study, which is Exhibit 5 to Professor
25 McCarty's deposition, more African Americans voted in Florida

1 in the 2012 general election, overall, than had in 2008, and
2 the African American share of the voting electorate was more in
3 2012 than it was in 2008.

4 So, this means that, in Florida, despite the elimination
5 of those days, more African Americans voted in the election
6 overall; and, while they used the EIP voting less, they voted
7 on Election Day more; and their share of the electorate, their
8 power as a voting block, went up as well. And there is no
9 evidence to suggest that Ohio's voters, of whatever race, won't
10 do the same as Florida's voters and adjust to the new schedule.

11 As plaintiffs have not shown that Ohio voters are
12 severely burdened by enjoying the ninth most liberal voting
13 system in the country, Ohio's choices are justified by the
14 important state interest of uniformity across Ohio's 88
15 counties, which is something that plaintiffs' counsel, the
16 ACLU, has long advocated for, and of reducing the potential for
17 fraud and on efficiently spending taxpayer dollars on board of
18 elections' resources, including employee salaries. And they
19 must provide for employees to be there to register people and
20 to take their ballots.

21 Ohio has 88 counties. They vary in size greatly. For
22 example, Directive 2014-17 was based on a plan that was put
23 forth by the OAE0, which is representative of all Ohio's
24 counties, and attempted to take into account, as evidenced by
25 the affidavits from the OAE0 folks, or the declarations, the

1 needs of not only Cuyahoga County, but Clinton County, to try
2 to find a plan that would be uniform, but that would also,
3 especially in a non-presidential election, accommodate the
4 resources and utilization of early voting in all of the
5 counties.

6 This interest is important. As I said, the issue is a
7 years' long call for uniform hours across the state.

8 And it's important to note that if this Court strikes
9 down SB 238 and Directive 2014-17, no law will be in place that
10 requires any particular early voting schedule. So, Ohio's
11 counties would be free, as they were in 2010, to set their own
12 schedules.

13 Some might set schedules that are broader than the one
14 in Directive 2014-17, but many will, undoubtedly, set schedules
15 that provide less early voting opportunities than does
16 Directive 2014-17.

17 Voters, including African American voters in Allen
18 County or Washington County, should have no less opportunity to
19 vote than voters in Cuyahoga County. And, at the same time,
20 Ohio's counties do vastly differ in their resources, their
21 ability to provide for early voting and in their general
22 utilization of it. That's why the OAE0 suggested what it
23 suggested and why the Secretary did what he did in adopting the
24 current hours.

25 SB 238 and Directive 2014-17 are justified by these

1 legitimate State interests.

2 In sum, Your Honor, the statute and the directive
3 provide the same voting opportunities to all Ohioans no matter
4 their race, no matter where they live. It's a generally
5 applicable nondiscriminatory voting regulation of the exact
6 type the Sixth Circuit said would be upheld in the Obama for
7 America case.

8 It, obviously, as Your Honor has acknowledged, differs
9 from the issues that were before this Court in the OFA case,
10 because in that case two classes of voters were subject to
11 different rules. There were different rules for UOCAVA and
12 non-UOCAVA voters. Here, the rules apply the same way to
13 everyone.

14 There is absolutely, moreover, no evidence in the record
15 of any intent on the part of the General Assembly or the
16 Secretary to disenfranchise African Americans.

17 Importantly, there is no evidence that the current
18 system makes it impossible for anyone to vote; rather, that
19 some voters may not be able to vote at the time or with the
20 method they may prefer or may have used in the past. But Ohio
21 provides around-the-clock early voting by mail, voting on
22 Saturdays, voting on Sunday for this election and voting on 13
23 hours, including early morning and evening hours, on Election
24 Day itself, the latter of which, the voting on Election Day
25 itself, is all the residents of Pennsylvania, Michigan, New

1 York and dozen of other states are offered.

2 The goal in Ohio is to make it easy to vote and hard to
3 cheat. And that's exactly what SB 238 and Directive 2014-17
4 do.

5 As in the North Carolina case, the plaintiffs here
6 haven't shown they're entitled to extraordinary relief by clear
7 and convincing evidence, which is the burden they bear here.

8 And we respectfully ask the Court to deny the motion for
9 a preliminary injunction.

10 Thank you.

11 THE COURT: Thank you.

12 MR. YOUNG: Your Honor, may I have a minute to confer
13 with my colleagues?

14 THE COURT: Sure.

15 Do you want to take a short recess?

16 MR. YOUNG: Sure.

17 THE COURT: About ten minutes.

18 (Whereupon, a recess was taken from 10:25 a.m., and
19 the proceedings reconvened at 10:40 a.m.)

20 - - -

21 IN OPEN COURT:

22 MR. YOUNG: Your Honor, if we can just respond, real
23 briefly, to defendants' arguments, number one, this is a
24 case -- Your Honor is well aware this is not about the absolute
25 right to "X" number of days of early voting. This is about how

1 Ohio has redefined its in-person early voting period to roll
2 back specific voting opportunities that Ohioans have
3 increasingly come to rely on over the years.

4 This is not about a comparison to other states. Your
5 Honor is well aware of that. That's not in OFA. And, under
6 Stewart, it requires an intensely local appraisal.

7 Another reason you can't compare it to other states is
8 because, other states, there are many different factors other
9 than raw number of voting days.

10 Florida/Miami-Dade County has 20 polling locations.
11 Ohio has one. Other states have different kinds of hours. Not
12 all hours are created equal.

13 Second, Your Honor, about the mid-term elections, this
14 case is not about turnout. Mid-term elections or low turnout
15 does not affect -- does not change the circumstances of a
16 low-income voter who cannot take time off work to vote. And
17 that's what the Secretary of State, in 2010, recognized when
18 she voted in favor of expanded evening and weekend hours in the
19 2010 mid-terms.

20 Also, just real briefly, when we talk about the mid-term
21 elections, it's kind of odd for defendants to kind of
22 characterize it as if it's not as important when both
23 defendants are running for reelection, we're voting for a
24 governor, we're voting for every single member of the Ohio
25 House of Representatives and half of the Ohio Senate, when

1 we've demonstrated history of difficulties of African Americans
2 winning those exact offices.

3 And, lastly -- not lastly, but the next point, which is
4 just a factual error, they say we haven't presented evidence
5 that African Americans use evening hours more than whites. I'd
6 point to Exhibit 5 and Exhibit 7.

7 They've said that African Americans don't vote by mail;
8 we haven't shown that African Americans don't vote by mail.
9 I'd point to Exhibit 8 and Exhibit 6.

10 They've also pointed out that Dr. Smith said that there
11 weren't that many people who took advantage of same-day
12 registration.

13 Your Honor, defendants' own documents -- this is Exhibit
14 50 and Exhibit 52 -- showed that over 14,000 Ohioans took
15 advantage of same-day registration in 2012. That's an increase
16 from the 12,600 voters who took advantage of same-day
17 registration in 2008.

18 Next, Your Honor, we talk about -- defendants talk about
19 this aspect of retrogression in Section 2.

20 Retrogression, you do look at. You compare the old
21 versus the new. And that is under Section 5. But, as the
22 Sixth Circuit explained in Stewart, under Section 2, you're
23 comparing the relative burdens that are imposed by challenged
24 voting restrictions on blacks versus whites.

25 So, in Stewart, that was the challenge to old voting

1 technology. In Frank v. Walker, that was a challenge to the
2 voter ID law. And, in Operation Push, that was a challenge of
3 the failure to have satellite registration offices.

4 Next, let's talk very briefly about North Carolina,
5 which I understand Your Honor hasn't had a chance to digest.
6 But North Carolina is entirely distinguishable on the facts.

7 In North Carolina, they eliminated several days from the
8 early voting period. But, as the District Court explained on
9 page 94 of its decision, quote: The decrease in permissible
10 days is coupled with a required increase in voting hours.

11 And those boards of elections in North Carolina can meet
12 that requirement either by opening more voting sites or by
13 having more hours, including on evenings and weekends.

14 In Ohio, they can't open any more polling sites by law.
15 And, in Ohio, this year, they can't have any evening hours.
16 So, those -- that, alone, distinguishes this case from North
17 Carolina.

18 With respect to the North Carolina case's discussion of
19 the same-day registration issue, first of all, the Court
20 acknowledged that African Americans use same-day registration
21 more than whites. But the Court rejected the same-day
22 registration claim because it found that there was not enough
23 time to verify the registration because, in North Carolina, the
24 same-day registration period extends all the way to Election
25 Day.

1 So, that's the critical difference here, Your Honor.

2 Here, same-day registration ends nearly 30 days before
3 Election Day. There is plenty of time to verify the
4 registration.

5 Lastly, the North Carolina Court found -- and this is on
6 page -- I apologize. I don't have the exact page number, but
7 the quote is: Plaintiffs did not show any fewer Sunday hours
8 will be offered this year than in 2010.

9 Your Honor, we've shown here that, in 2010,
10 seventy-eight percent of the State's African Americans had
11 access to multiple Sundays. This year, zero percent of the
12 States' African Americans will have access to multiple Sundays.

13 Real briefly about the argument about differential
14 treatment of voters, Your Honor well knows that the Sixth
15 Circuit explained, in Northeast Coalition for the Homeless, the
16 2012 case, that an absolute burden on the right to vote can
17 also violate the Constitution.

18 They make a point about causation: that we haven't
19 showed that these restrictions make it impossible for people to
20 vote.

21 The Sixth Circuit, in Stewart, already rejected that
22 notion that we have to demonstrate outright denial of the right
23 to vote.

24 The next point they mentioned, Sean Trende, because --
25 this is very misleading, Your Honor, so I want to be very clear

1 about this -- they say that Sean Trende looked at data from all
2 88 counties in 2010 and found no racial difference in the use
3 of early voting.

4 I think this is on page 52 of Trende's report. He
5 relies on U.S. Census Bureau survey data. Okay? He is not
6 relying on the State's data. He is relying on survey data.
7 And, as Dr. Smith explains on page 140 of his deposition, the
8 survey sample from 2010 is too small to draw any reasonable
9 conclusions. That's why he relies on 2008, which showed double
10 the rate, and 2012, which showed triple the rate.

11 And I also want to make sure Your Honor understands
12 defendants' three experts, Dr. McCarty, Dr. Brunell and Mr.
13 Trende, their qualifications in this case, Your Honor, are very
14 questionable.

15 Dr. Trende -- I'm sorry. Mr. Trende doesn't have a
16 Ph.D. He's a -- it's spelled p-s-e-p-h-o-l-o-g-i-s-t. He is
17 that word, which I hadn't heard before. And there is no degree
18 or professional certification in psephology. There is no
19 university with a department in it, and there is no
20 professional associations in psephology. And that is found in
21 Exhibit 70.

22 Dr. McCarty expressly admitted that he did not consider
23 himself an expert in early voting. That's on page 37. And
24 he's never written anything on the burdens imposed by
25 eliminating early voting, and he's never written about same-day

1 registration. That's page 40 to 42.

2 Dr. Brunell conceded he's never written an article about
3 early voting, never did any empirical studies on early voting.
4 That's pages 43 to 45 and 51 to 57. And defendants, again, are
5 repeating this kind of mantra about preferences and
6 convenience.

7 Your Honor, this is not about the hypothetical middle-
8 or upper-class person, which probably describes everyone here.
9 This case is about low-income voters. And plaintiffs have
10 produced overwhelming evidence of the reality they face in
11 their day-to-day lives.

12 Lastly, Your Honor, this uniformity point.

13 Uniformity does not justify the elimination of hours
14 across the board. It just as easily justifies adequate hours
15 across the board.

16 Your Honor, you should grant plaintiffs' motion for
17 preliminary injunction.

18 THE COURT: All right. Thank you.

19 If there is any misstatement to be corrected, otherwise,
20 what does defense have to add?

21 MR. VOIGT: Just two quick points, if I may, Your
22 Honor.

23 THE COURT: All right.

24 MR. VOIGT: And, if I may, just -- my colleague could
25 maybe just have one quick point or two --

1 THE COURT: All right. Sure.

2 MR. VOIGT: -- with your permission.

3 THE COURT: All right.

4 In chambers, we said I'll allow rebuttal; but, if there
5 is something that needs clarified, I'm open to it.

6 MR. VOIGT: Okay.

7 Real quickly, regarding the applicability of other
8 states' -- the voting laws of other states, obviously,
9 plaintiffs do not want this Court to consider the laws of other
10 states because Ohio has one of the most liberal voting systems
11 in the entire United States.

12 THE COURT: Right. I know that. We've been over
13 that. I even stated that in the Obama case. I know that.

14 MR. VOIGT: And other courts, in looking at these EIP
15 early voting issues, have looked at other states to compare
16 where they stand with the other states.

17 And one other quick point.

18 Dr. Smith, one of plaintiffs' experts, did not consider
19 in his report the time of day when individuals vote, either
20 African Americans or whites. I just wanted to point that out.

21 THE COURT: All right. Thank you.

22 MR. ARMSTRONG: Two very quick points, Your Honor, and
23 I appreciate your indulgence.

24 Point 1. With respect -- and this is just in response
25 to plaintiffs' new statements regarding Professor McCarty's

1 qualifications.

2 I urge Your Honor to read Professor McCarty's report in
3 his deposition. He is a professor at Princeton University. He
4 is one of the most brilliant people I've ever met. And the way
5 he addresses the issues, I think, is very, very easy to
6 understand for lay people.

7 His qualifications -- he is not an expert who has
8 published in early voting, but he is an expert in political
9 science. He earned his Ph.D. in three years, his master's
10 degree and his Ph.D. in three years. He's taught at Columbia
11 and Princeton. He is an expert at doing the sorts of empirical
12 studies that he applied in this case to address Dr. Smith's
13 report.

14 My last point, Your Honor, plaintiffs' argument in this
15 case, if it prevailed, would create a system under which a
16 state could expand its voting opportunities, but could never
17 contract them. No case says that Section 2 requires that.

18 Thank you, Your Honor.

19 THE COURT: All right.

20 Thank you, Counsel. This matter is submitted, and the
21 Court will take it under advisement.

22 (The proceedings were adjourned at 10:50 a.m.)

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24
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C E R T I F I C A T E

United States of America
Southern District of Ohio

I, Denise N. Errett, Official Court Reporter of the
United States District Court for the Southern District of Ohio,
do hereby certify that the foregoing 62 pages constitute a true
and complete transcription of my stenographic notes taken of
the proceedings held in the afore-captioned matter on the 11th
day of August, 2014.

In testimony whereof, I hereunto set my hand on the
12th day of August, 2014.

/S/Denise N. Errett, FCRR
Denise N. Errett, FCRR
Official Court Reporter
Southern District of Ohio